CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF LOUISIANA.

West. District. *Sept.* 1818.

WESTERN DISTRICT, SEPTEMBER TERM, 1818.

WHITE vs. *WELLS' EX'RS.*

White vs. Wells' ex'rs.

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APPEAL from the court of the sixth district.

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Wells, the defendants' testator, applied for the land, and obtained an order of survey, and two days after the three years had elapsed, to wit, on the 22d of April, 1796, he received from the Spanish government a complete and final grant of the same.

Posterior to that final title, Thomas White, the plaintiff's father, attempted to put himself in possession of the land, for which he had obtained, in 1793, the order of survey above mentioned, and subsequently caused that order of survey to be confirmed by the commissioners of the land office.

We are of opinion, that this confirmation does not, as in the case of two inchoate titles, put the claim of Thomas White on a footing with the final title granted by the Spanish government to Levy Wells, and that it does not replace the parties in the situation in which they were, before that final title and patent issued. The functions assigned to the commissioners were those of ascertaining and adjusting claims to lands, where the title was yet inchoate. But wherever the right of the sovereign had been finally transferred, any subsequent relinquishment of the right of the United States cannot affect the anterior title.

It is in vain to say that Levy Wells did not

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comply with the conditions usually attached to grants. In his case, it has pleased the grantor to dispense with requiring any. The grant is a full and complete title, issued after the inchoate right of White had become null by the non-performance of the conditions imposed on him; it cannot be disturbed.

But, although Levy Wells was indisputably the owner of the land in contest, and, as such, could have ousted the possessor of it, he had no right to take possession by force. The jury have found that he has done so, and caused damage to the plaintiff to the amount of fourteen hundred dollars. The plaintiff is entitled to recover these damages.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that the plaintiff and appellee recover from the defendants and appellants the sum of fourteen hundred dollars; and it is further ordered, adjudged and decreed, that the former pay the costs of this appeal.

I. Baldwin for the plaintiff, *Wilson* for the defendants.

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MARTIN vs. JOHNSON & AL.

MARTIN
vs.
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APPEAL from the court of the first district.

One who holds land by purchase from the Indians, by a private sale, approved by the governor of the province, cannot be disturbed, on the ground that the sale was not by auction, by a person who does not claim, under them.

Whether Indians, located by the governor of the province, had only the use, or the property, of the land allotted to them?

DERBIGNY, J. delivered the opinion of the court. The plaintiff and appellant claims a tract of land, part of which is in the possession of the defendant. The title which he presents, is a certificate of the commissioners of the land office, containing a settlement right, the history of which is as follows: in the year 1790, or 1791, one Jesse Kirkland began some clearing on the land in contest, which was then a part of a tract of country assigned to the Choctaw tribe of Indians, a long time before. Kirkland's clearing consisted of two or three acres of ground, on which he had cut the canes and planted some corn: he never lived there, and made only one crop: he sold his corn and the crib that contained it to one Martin Trentham, who continued sometime to cultivate there, it is said about five acres; he lived in a cabin made of pickets: some of the witnesses say he was there only by permission of the Indians, because he was a gunsmith, and mended their guns. Trentham,

MATHEWS, J. did not join in this opinion, having some interest in the decision of the question in controversy.

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after one or two years residence on that spot, went away, and never returned to it again. An attempt has been made to shew, that Jean Kirkland, his predecessor, had applied by *requête* for the land; but that fact was not proved. Twelve or thirteen years after Trotham had left the place, his widow undertook to take possession of it again.

In the mean time, however, say about twenty-two years ago, the Pascagoula and Biloxi tribes of Indians were removed to bayou Boeuf, and with the consent of the Choctaws, were located on part of their land; the portion which includes the land here in contest, falling to the share of the Pascagoulas. The Pascagoulas remained in possession of that tract until the year 1802, when they and the other Indians, their neighbors, did, with the approbation of the Spanish government, sell their respective portions to Miller and Fulton, under whom the defendant now holds. Under that purchase, Miller and Fulton applied to the commissioners of the land office for a confirmation of their claim; and by the law of April, 1816, it was confirmed, as the court then conceived it, to the extent of one league square.

To facilitate the decision of this cause, in case that league square should include the land

here in contest, this court had, by an interlocutory decree, ordered that verification to be made; but, as it appears by the return of the survey, that a portion of that land is not embraced by the league square, the cause remains in the same situation.

It has been contended by the defendant, that the act of congress, above mentioned, did not merely confirm the purchase of Miller and Fulton to the extent of one league square for the whole, but of one league square for each purchase, each being a separate claim or orginal right, though included in the same application for confirmation. Waving, however, any inquiry into that question at present, we will now investigate the defendant's right, on the original merits, independently of any confirmation by the United States.

It is unnecessary here to determine what was the rights of the Indians to the soil of America, when the Europeans took possession of it. The defendant is probably correct, when he considers them as the primitive lords of the land. But they were not indistinctly and promiscuously owners of the whole. The several tribes, who inhabited this country, were independent and separate. Each was in possession of a certain extent of land, over which they

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claimed the right of ownership. In order then to apply to the present case the principle contended for by the defendant, he ought to have shewn that the tribes, under whom he claims, were, at the time of the arrival of the Europeans, the occupants of the tract here in dispute. But the reverse being the case, this part of his defence cannot avail him.

The fact, as given to the world, in all the laws enacted on the subject is, that the king of Spain, in taking possession of his dominions in America, disregarded the rights of the original lords of the soil, and declared himself the sovereign of the country. As some compensation, however, for that usurpation, he assigned to the former proprietors such extent of land as they wanted; and particularly took care to secure to them, by law, such tracts as he conceived were sufficient for the purposes of cultivation, and for which pasturage of their cattle. In the title 12th, book 4th, of the *Recopilacion de las Indias*, treats of the manner in which lands shall be disposed of generally, the law 13, among other dispositions, provides that the Indians "shall be maintained in the possession of the lands which had hitherto been allotted to them, and shall receive any additional quantity which they may want." On the regulations concerning the

lands and villages of the Indians, the whole 3d title of book 6th may be referred to.

The law 8th of that title, however, particularly says—"the seats on which the villages of the Indians shall be placed, shall be such as are well provided with water, arable lands and woods, and to which there may be easy access, and they shall have a common of one league in extent, where their cattle may graze, without being mixed with that of Spaniards."

But, it is contended on the part of the plaintiff—1. that, in this case, the land was not assigned to the Pascagoula and Biloxi tribes by the proper authority—and 2. that, if it were, yet the Indians did not acquire an absolute title to the land, so as to be capable of transferring it to other persons.

I. The evidence, as to the first of these objections is, that the Baron de Carondelet, then governor of Louisiana, ordered Valentine Lessart, commandant of Rapides, to remove the Pascagoula and Biloxi tribes of Indians to the district of Catahoulou; but that, upon representation made to the governor, he thought proper to dispose that those tribes should be located on the bayou Bœuf, along with the Choctaws, and that they were so located with the consent of the

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Choctaws. It is well known that, for the location of an Indian village, no such thing as formalities and written proceedings were in use in this country. An order from the governor to that effect was sufficient, as it was in many other instances of greater importance. Valentine Lessart himself has been heard on the point, and his testimony corroborated by others, and by the long possession which those Indians had of that tract of land, is deemed sufficient and satisfactory.

II. But, it is said, that such location of the Indians, on any tract of land, did not convey to them the property of the soil, but gave them a mere possession, for the temporary purposes of the Indian mode of life. By the laws of the Indies, 6, 1, 27, however, it is recognized, that Indians can hold land, as well as other people; nay, that they can alienate it, with permission of government. That this was holden by them, as owners, there can be no doubt; there they had their villages and fields; there they lived permanently for a number of years; it was not a place of temporary residence; it was their home.

But, if the Indians, under whom the defendant holds, were proprietors of the soil in the

pute, and could sell it, yet it is contended, that the sale which they undertook to make of it, is not a valid one, and, consequently, could convey no title to purchasers. It is true, that the laws of the Indies require the property of the Indians to be sold at auction, and that this was a private sale. But, although we are disposed to believe that the subsequent approbation of the governor of the province did cure that defect, supposing that it did not, the result would be that the Indians have not been legally divested of their title, and could perhaps take advantage of that against the defendants; but, until then, the defendants hold in their right, and cannot be disturbed by others.

Although the court has already said, in the case of *Reboul* vs. *Nero*, that the Indians were entitled by law to one league in extent, round their villages, *ante* 490, it is deemed unnecessary to determine it; for allowing them much less, it would still embrace the property in dispute.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

I. Baldwin for the plaintiff, *Johnson* for the defendants.

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MARTIN'S HEIRS vs. GARDNER & AL.

MARTIN'S HEIRS vs. GARDNER & AL.

APPEAL from the court of the first district.

The defendant cannot be disturbed, when the plaintiff does not shew a better title.

MATHEWS, J. delivered the opinion of the court. The parties claim the tract of land in dispute, under titles derived from different persons. These titles are so nearly equal in solemnity and perfection, that it is useless, in this respect to compare them. The defendants and appellees shew a commencement of title older than that of the plaintiffs and appellants, which being equal to it, in other respects, they ought not to be disturbed in their right and possession to the disputed property.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed, with costs.

I. Baldwin for the plaintiffs, *Wilson* for the defendants.

BRADLEY'S HEIRS vs. *CALVIT.*

It is not enough to prove that a paper, purporting to be a bill of sale, was seen in the hands of the adverse party:

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. The plaintiffs and appellees claim a tract of land, described in their petition, as

heirs of Nancy Bradley, who succeeded, as sole heir, to her son, Joshua, who was the legal heir of the land, at and before the time of his death, having a title to it, by virtue of a sale, under private signature, by J. Clayton, who held under an incomplete title from the Spanish government. The defendant and appellant, who is in legal possession of the premises, sets up a title, derived from the same original proprietor, by an authentic deed of sale to Francis Bradley, a brother of Joshua, the person who filed a claim to the premises, before the commissioners of the United States, and obtained their certificate, confirming his title.

but proof must be made of its genuineness.

It is the opinion of this court, that the effect of the certificate thus obtained, does not, in any respect, alter the rights which may have been acquired under the former government of the country, and which must be decided on between individuals, according to the laws and regulations of said government. Viewed in this manner, the certificate obtained by Joshua Bradley is nothing more than a confirmation of Clayton's title, and must accrue to the benefit of persons claiming under him, by legal and *bona fide* contracts. The sale to Joshua Bradley, under whom the plaintiffs claim, being a private act, requires testimonial proof, even to give it force

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and effect between the original parties; and was it supported by legal testimony, would be clearly good between them, and, according to the principles of equity and justice, ought to bind third parties, who have a knowledge of the existence of such a sale.

In the case under consideration, the private act of sale, being out of the power and control of the plaintiffs and appellees, they offered proof of its existence, and succeeded in establishing the fact, that a paper, purporting to be such a sale, did exist, and was, at one time, seen in the possession of Francis Bradley, under whom the defendant claims title; but they have produced no evidence of its genuineness—nothing to induce a belief, arising from legal proof that it was the act and deed of Clayton, the original proprietor of the land in dispute: a fact, the proof of which is deemed indispensible by this court, in making a legal deduction of title from Clayton to the plaintiffs.

The circumstance of a probability that this act of sale was before the commissioners of the United States, and that they recognized it as genuine, cannot avail, in a dispute like the present, founded on a title not immediately deduced from the United States.

It is a general rule that, in all petitory ac-

tions for the recovery of property, the plaintiff must recover on the strength of his own title, and not on the weakness of that of his adversary.

The failure of the plaintiffs, in the present case, to prove the genuineness of the act of sale from Clayton to Joshua Bradley, leaves them without a title, derived from the former to the latter, and, as they can claim nothing under the certificate of the commissioners of the United States, except in conformity with, and supported by, Clayton's title.

On this ground alone, without examining any other question in the case, we are of opinion, that the plaintiffs and appellees have not shewn aught to authorize a judgment in their favor.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and, proceeding to give here such a judgment as, in our opinion, ought to have been given in the district court, it is ordered, adjudged and decreed, that judgment be entered for the defendant and appellant, with costs of suit, in both courts.

I. Baldwin for the plaintiffs, *Wilson* for the defendant.

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FRANKLIN vs. KEMBALL'S EX'RS.

FRANKLIN vs. KEMBALL'S EX'RS.

A certificate that the record contains all the facts on which the cause was tried is good, though made one year after judgment.

If the executors, interrogated as to the genuineness of their testator's note, answer, they believe it to be so, but believe it paid, this will be no proof of payment.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. In this case there is no statement of facts, but the district judge has certified to this court that the record contains all the evidence adduced on the trial, under the act of 1817, *p.* 34. § 4.

The certificate is objected to on the ground that it was given upwards of a year after the judgment, while in the opinion of the counsel, this mode of presenting to this court the facts of the case, being only a new mode of making a statement of facts, the time is therein as important as when the former mode is resorted to, and therefore the certificate ought to have been given before judgment, and could not be made afterwards.

A majority of this court, (MARTIN, J. dissenting) is of opinion, that as the act of 1817 fixes not a particular time within which the judge may certify, he may do so at any time, in his discretion, as long as his memory serves him.

The defendants are sued on a note of the testator for 300 dollars, claimed with interest—on the back is an endorsement, acknowledging the

receipt of 94 dollars 50 cents, subscribed by the plaintiff. Two of the defendants pleaded payment, the third, Joseph Kemball, denied being an executor.

The petition contained an interrogatory, whether the note was not made and signed by the testator. To which, the two defendants Daniel M. Kemball and Middleton W. Kemball answered "that they believe that the note was signed by the said F. Kemball (the testator) and that the amount of said note was paid by said F. Kemball in his life-time to the said Franklin."

There was judgment for the plaintiff, for the sum of 300 dollars, with legal interest till paid."

The defendants appealed.

They cannot avail themselves of the part of their answer, which alledges payment by the testator, because they swear only to their *belief*.

The district court erred in giving judgment against Joseph Kemball, as he denied that he is one of the executors, and there is no proof of it.

The court erred also, in disallowing the payment, endorsed on the note.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that the plaintiff do recover

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from Daniel M. Kemball and Middleton Kemball, executors of Frederick Kemball, the sum of two hundred and five dollars fifty cents, with interest at five per cent. from the inception of the suit, till paid with costs in the district court; the costs of the appeal to be borne by the plaintiff and appellee, who is also to pay the costs incurred by Joseph Kemball in both courts.

I. Baldwin for the plaintiff, *Johnson* for the defendants.

HOOPER vs. *MARTINEAU.*

If it be shewn that the whole testimony has not been transmitted, a *certiori* will issue.

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. This is a case in which the evidence comes up with the record, under an act of the legislature, approved on the day of 18 . It appears by affidavits, taken by the appellee, that the whole evidence did not come up, but that the testimony of one Anderson, who was examined in the district court, is wanting.

This circumstance, not being denied by the appellant, it is ordered that a mandate, in the nature of a *certiorari*, be directed to the district

court, requiring that the testimony of every witness sworn on the trial of the case, taken down in writing, be certified and transmitted to this court, and particularly that of said Anderson, returnable at August term next.

Wilson for the plaintiff, *I. Baldwin* for the defendant.

MAYES vs. *CALVIT.*

This case turns on a mere question of fact.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiff sues for a mulatto slave, sold to him by the defendant, whom the latter refuses to deliver. The answer contains a general denial, and an amended one states that the defendant never received any consideration for the said mulatto, and that neither the plaintiff nor any one else has paid to the defendant the consideration money for the sale.

Annexed to the petition is a paper purporting to be signed by the defendant, acknowledging the receipt of two hundred dollars, in full, for the price of the mulatto.

The plaintiff interrogated, as to the manner

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in which the consideration money of the sale of the mulatto boy was paid, answered that he paid eighty-five dollars in part payment of a note of the defendant to Joseph Catril, nineteen dollars to Henry Winns, on the defendant's verbal order—a gold watch, of the value of two hundred dollars, delivered to the defendant, by giving the title to the said watch to the defendant, in presence of Coleman Martin or Joseph Martin, the plaintiff not recollecting which of them—in all three hundred and four dollars.

The above answer being excepted to, and a fuller one required, the plaintiff answered, that the title which he gave to the defendant, for the watch was a verbal order on one E. Head, of Natchez: the defendant knew that the watch was the plaintiff's property, and said he knew in whose hands it was, and that a verbal order would answer his purpose, as well as money, and he would take the order in part payment of the boy—that the defendant took the said order, on his own risk, and received the watch thereon, or a full compensation therefor.

James Fillup deposed, that the watch was seized, as the property of John M. Martin, by the sheriff, at Natchez, and sold, and he believes J. Thompson bought it. Some time after, Coleman Martin appeared and claimed the

watch, and made affidavit that it was his property.

By the record of a suit, in the county of Adams, state of Mississippi, it appeared that, in a suit instituted by attachment, at the instance of John Foster, against John M. Martin, a gold watch was attached and finally sold by the sheriff to said John Foster, for one hundred and thirty dollars, January 17, 1814—three weeks after the date of the receipt of the present defendant, for the price of the mulatto boy.

There was judgment for the defendant, and the plaintiff appealed.

The plaintiff has not administered any proof of the genuineness of the defendant's signature at the foot of the receipt, annexed to the petition, which he was bound to prove—the answer having denied it. There is, therefore, no evidence of any sale of the mulatto boy, nor of the payment, except what results from his answer to the interrogatories.

He swears he paid two hundred dollars, by the delivery of a watch—that is to say, the transfer of his right thereto, by a verbal order for the delivery of the watch to one C. Head, of Natchez; but he also swears that the sheriff had taken possession of the watch before the

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transfer of it by the plaintiff to the defendant; and by the record of the suit, in which the watch was sold, it appears that the watch was seized on the 9th of June, 1813, more than six months before the date of the receipt annexed to the petition—so that, from the plaintiff's own shewing, the order which the defendant received from him was directed to a person who had not the watch then, and does not appear ever to have had it since. If the defendant received this order in full payment of the value of the watch, it must have been on the assurance that the person to whom it was directed had the watch in his possession, and could deliver it—in this it is clear he was deceived by the plaintiff.

The answer of the plaintiff, that the watch was not sold as the property of Martin is contradicted by the deposition of Muse, and by the record.

The answer of the plaintiff is not entitled to any credit, and there is no evidence in his favor out of it. The district court was, therefore, correct in giving judgment for the defendant.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs.

Wilson for the plaintiff, *I. Baldwin* for the defendant.

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BOGGS vs. *REED.*

Boggs vs. Reed.

APPEAL from the court of the sixth district.

The courts of this state cannot presume what the laws of other states or foreign countries are. Such laws must be proven.

MARTIN, J. delivered the opinion of the court. In this case, the plaintiff offered in evidence the depositions of John Carlisle and John M'Coy, of the state of Ohio, to prove the legal interest in that state, on promissory notes, (where no interest is expressed therein) which was objected to by the defendant. The district court was of opinion that no interest was allowed at common law, more particularly where none was mentioned in the contract—that, therefore, it was presumable that interest was allowed in the state of Ohio by statute—that parol evidence of the statute could not be admitted, and rejected the evidence. To this opinion the plaintiff excepted, and there being judgment for him for the principal, without interest, he appealed.

The case stands before us on the bill of exceptions only.

We think the district court erred, in assuming it as a fact that interest cannot be allowed under the common law of the state of Ohio. The knowledge which the judges of the courts of the state of Louisiana have of the laws of their own

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state, and of those of the United States, must direct their opinions and their conduct. The laws of other states must be *proven before them*, in every case in which it is proper they should influence their opinion. No country is believed to exist in which every tittle of the law is reduced to a text. The memories of the members of this court does not enable them to cite any country in which some part of the law is not unwritten. We have no official means of information that may enable us to conclude that the people of the state of Ohio are without unwritten law. We, therefore, conclude that the witnesses offered by the plaintiff ought to have been heard.

The judgment of the district court is, therefore, annulled, avoided and reversed, and the cause is remanded for a new trial, with directions to the district court to hear the witnesses offered—and it is ordered, that the costs of this appeal be borne by the appellant.

Sutton for the plaintiff, *I. Baldwin* for the defendant.

CURTIS vs. *MARTIN*.

The surety may be sued, without the principal.

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court.

The defendant is sued on a note which he subscribed as surety. He answers that the property of the principal has never been discussed and is sufficient, and he avers that the note has been paid by the principal.

There was judgment for the defendant, and the plaintiff appealed.

The statement of facts shews that a demand was made from the principal, but no suit was instituted against him before the bringing of the present suit—that, at the date of the note, the principal resided in the parish of Rapides, and before the suit was brought he removed to that of Avoyelles—that the plaintiff and defendant did and do still reside in Rapides.

As there is no proof of the alledged payment, it appears to this court that the district judge erred in giving judgment for the defendant. The plaintiff is not required by any law to sue the principal before he resorts to the surety. In many cases a suit against the principal would be productive of delay and expense only.

It is true, that if the surety requires a discussion of the principal's property, it must be made, but "the surety who does require the discussion is bound to point out to the creditor the property of the principal debtor, and furnish a sufficient sum to have the discussion carried into effect."

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Code Civil, 430, *art.* 9. As the defendant did not point out any property and furnished no money for the discussion, the plaintiff was not bound to discuss.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed; and that the plaintiff do recover the sum of six hundred and thirty three dollars, sixty two and one half cents, the amount of the said note, with interest as therein promised, at the rate of ten per cent. a year, from the twentieth of October, eighteen hundred and seventeen till paid, with costs of suit in the district court, and in this.

Wilson for the plaintiff, *Scott* for the defendant.

CASSON & WIFE vs. *FULTON'S EX'RS.*

On a verbal sale of land, either of the parties may recant before the conveyance be executed.

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. This is a case, in which the plaintiffs and appellants sue to recover certain lots of ground, in the town of Alexandria, or to have the price which they paid for them reimbursed, if they fail in their attempt to establish their title to them.

It appears from the evidence that the testator of the defendants and appellees did, in his lifetime, make a verbal sale of said lots, to Mrs. Casson, before her marriage, received the stipulated price and promised to make to her a regular conveyance, at some convenient time, as alledged in the petition. The evidence also shews that he afterwards refused to make such a conveyance, giving as a reason that the purchaser had offended him.

These facts shew that the intention and agreement of the parties was to have their contract of sale reduced to writing, and according to the principle recognized by this court in *Villere & al.* vs. *Brognier*, 3 *Martin*, 507, whenever a contract is to be reduced to writing, either of the parties may recant before signing.

In the present case, it appears that the vendor, before his death, declared that he would not comply with his verbal bargain, by making the conveyance stipulated for; and, it is believed that there are no legal means by which he could be compelled so to do, were he living, nor can any decree be made against his executors to that effect.

It is, therefore, ordered, adjudged and de-

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creed, that the judgment of the district court be affirmed, with costs.

Wilson for the plaintiff, *Scott* for the defendant.

BOISSIER & AL. vs. *METAYER.*

The surrender of the sole evidence of an inchoate & conditional title, before the accomplishment of the condition, is an implied abandonment of all rights under it.

The Spanish government could lawfully grant the land, when the grantee had neglected to fulfil the condition of the grant.

APPEAL from the court of the sixth district.

DERBIGNY, J. delivered the opinion of the court. A tract of land, which is in the possession of the defendant and appellee, since a number of years, is claimed by the plaintiffs and appellants. The title, which they exhibit, is an order of survey, obtained in 1789, from the then governor of Louisiana, recommended for confirmation by the commissioners of the land office, for the western district of this state, and finally confirmed by act of congress in 1815. In opposition to it, the appellee produces an order of survey of the same land, by him obtained in 1795, and confirmed by the commissioners of the United States in 1812—he further pleads prescription. The right of the United States having been relinquished in favor of both these claims, the decision of this contest rests upon the strength of the original titles of the parties. The material facts in the case are the following:

As early as 1788, Sylvester Boissier, one of the appellants, and father of the other appellants, Sylvester, Cesar and Pamela Boissier, went on the land in question, with three negroes, cut several acres of cane, and opened the road in front; in the same year, he applied for a grant of the land; and, in 1789, obtained from governor Miro an order of survey and conditional grant, in the usual words—according to which he was to make some improvement, and open the road within one year, and to settle the land before the expiration of three years, in defect of which the grant was to remain null. It is, however, in evidence that, after his first attempt, in 1788, he ceased to do any thing upon the land—that he never settled it, and that, at sometime between the years 1789 and 1795, (it does not appear clearly when) he surrendered his title into the hands of the commandant of Natchitoches, among the papers of whose office it was lodged, in a bundle entitled *Requêtes des concessions de terres reunies au domaine*, where it remained until the archives of that office were delivered to the person who received possession of that place for the United States.

It is objected, that the fact of this surrender is not sufficient to destroy the written title of

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the plaintiff, and that nothing short of a written declaration from Boissier, that it was his intention to abandon the land, can do away his grant. We are, however, of opinion, that the surrender of the only existing evidence of an inchoate title, into the hands of the person from whom it had been obtained, and upon the accomplishment of a condition necessary to make it complete, implies an abandonment of the inchoate right. But, independently of that abandonment, resting the case upon the circumstance of the non-performance of the conditions imposed on the plaintiff, S. Boissier, by the Spanish government, we think that, at the expiration of the time fixed by the grantor for the accomplishment of those conditions, he had a right, when they were not fulfilled, to consider the grant as null, by virtue of the reservation by him made to that effect, and to grant the land to others, if he thought fit so to do.

In this case, after a verification that the land granted had not been settled, the Spanish government granted it again to the defendant under the same conditions—and the defendant, having performed those conditions, acquired the absolute right, which depended on that performance.

It is true, as the plaintiffs have observed, that the Spanish government was often very indul-

gent to grantees, and did not rigorously enforce the fulfilment of the conditions imposed on them. It is because of that notorious indulgence, that the United States have considered it beneath their dignity to treat with rigor the grantees, who, at the time of the cession of Louisiana, had neglected to execute what the conditions of their grants required of them. But because the Spanish government was often indulgent to grantees, surely we are not to consider as a dead letter the reservation made in every provisional grant, that the grant should be null, if the grantor failed to execute its conditions—that the grantor had, and that right he exercised in this among other cases. The first grantee, therefore, could not disturb the second, who, under this lawful exercise of the sovereign's right, has received the land, and acquired a final title to it, by the performance of the conditions attached to the grant.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed; and that judgment be entered for the defendant, with costs.

I. Baldwin for the plaintiffs, *Murray* for the defendant.

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SLOCUM. vs. SIBLEY.

C. SLOCUM vs. *SIBLEY.*

APPEAL from the court of the sixth district.

In particular partnerships one partner cannot bind the others, without authority, and the partners are not bound *in solido.*

MARTIN, J. delivered the opinion of the court. The judgment of the district court is in the following words: "The parties appeared, by their counsel, whereupon it is ordered, adjudged and decreed, that judgment be rendered for the plaintiff for two hundred and eighty-two dollars and seventy-four cents, with interest from November 17th, 1811, till paid, with costs of suit to be taxed."

The defendant appealed, and assigns as an error, that there is not the citation of any law, neither are any reasons adduced in the judgment. It is, therefore, annulled, avoided and reversed.

This court is now to proceed, examine the record, and give such a judgment as, in its opinion, the district court ought to have given.

The action is grounded on a note of hand, executed by the defendant, under the firm of W. Slocum and co. of which he is stated to be the surviving partner, payable to B. Shaumburg, by whom it was endorsed to the plaintiff.

The defendant pleaded the general issue and a former judgment on the note, at the suit of

Shaumburg, against Slocum and the defendant, in which they had judgment.

The statement of facts made by the district judge, is composed of the record of Shaumburg's suit, and the depositions of J. Harrison and I. Lanard.

The first witness deposes, that Slocum was indebted to Shaumburg for goods furnished by the latter to the former, for a tavern, in Natchitoches, to the amount of four hundred dollars and twenty cents—that Shaumburg, threatening to sue, the plaintiff agreed to pay the debt, provided he might have against the present defendant the recourse which Shaumburg had. Accordingly, the note, on which this suit is brought, was executed by W. Slocum, and endorsed by Shaumburg, to the plaintiff, who advanced the money. All this was done at once, and an endorsement made on the back of the note of a payment of one hundred and seventy-two dollars and seventy-five cents, the amount of certain goods due to Shaumburg, by W. Slocum, on his private account.

The note is for four hundred and fifty-five dollars and forty-nine cents, with interest, at ten per cent. from November 17th, 1811, and is reduced by sundry payments to two hundred and eighty-two dollars and seventy-four cents.

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The articles of partnership between W. Slocum and the defendant are annexed to the record; and its object is the keeping of a house belonging to the defendant, as a tavern, by Slocum, for his and the defendant's account. By these, Slocum is to take charge of, and manage the house, stables, &c. to the best of his capacity, for the mutual benefit of the parties. All expenses whatever are to be equally defrayed and the profits so divided. The books and accounts to be kept by Slocum.

The second witness was introduced for the sole purpose of proving the death of Slocum.

On the plea of a former judgment, it does not appear to this court that there is any error in the judgment. Nothing shews that the goods the value of which was claimed in the two suits, and both suits are posterior to the date of the present note.

But, the defendant alledges, that Slocum had no right to bind him, and at all events not in *solido*. Their partnership was not a commercial, but a particular one. In particular, it is otherwise than in commercial, partnerships. The parties are not bound *in solido* for the partnership debts, and none of them can bind his partners, if they have not given him power so to do. *Civ. Code*, 398, *art.* 43.

The articles of partnership authorize Slocum to manage the house, stables, &c.—and the first witness deposes, that the note was given in payment of goods furnished by Shaumburg for the tavern. Both parties must, therefore, be bound, either from the implied authority to purchase necessaries, resulting from the obligation and authority to manage the house and stables, or from the circumstance of the goods having been used for their mutual benefit; but they are not bound *in solido*.

It is, therefore, ordered, adjudged and decreed, that the plaintiff recover from the defendant the sum of one hundred and forty-one dollars and thirty-seven cents, with interest, at the rate of ten per cent. since the 17th of November, 1817, till paid, with costs of suit in the district court. But the plaintiff and appellee to pay costs in this court.

Bullard for the plaintiff, *I. Baldwin* for the defendants.

JUSTICE vs. *WILLIAMS*.

In a possessory action, the judgment ought not to determine on the title to the premises.

APPEAL from the court of the sixth district.

MATHEWS, J. delivered the opinion of the court. It being questioned whether, according

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to the petition, the present action be a petitory or a possessory one, it is agreed, by the counsel of the parties in this court, that it is to be considered as possessory, and that the right of possession alone is to be decided in it. Viewed in this light, the part of the judgment, in the district court, which decides on the titles of the suitors, is erroneous; but it is correct, so far as it decrees the right of possession to be in the defendant and appellee: he having been in peaceable possession of the land, more than one year before the suit was commenced, as appears from the facts in the case.

It is, therefore, ordered, adjudged and decreed, that the defendant and appellee be quieted and maintained in his possession of the premises, without prejudice to either party, in any petitory action that may hereafter be brought by any of them, founded on their respective titles. The costs to be paid by the appellant.

I. Baldwin for the plaintiff, *Wilson* for the defendant.

MUSE vs. *CURTIS.*

Even when the judgment is grounded on a verdict, the reasons which

APPEAL from the court of the sixth district.

MARTIN, J. delivered the opinion of the court. The plaintiff, in this case, had a verdict, and

the court gave judgment in the following words: "Judgment for the plaintiff, for the sum of seven hundred and fifty dollars, with costs of suit to be taxed." The defendant appealed—and assigns for error, that the judgment makes no reference to any law, and contains none of the reasons on which it is grounded.

determined the court, must be inserted therein.

The plaintiff and appellee replies, that there was a verdict, and the record, after the entry of it, proceeds—"Whereupon it was decreed by the court in the following words, viz. judgment for the plaintiff," &c.—that the word *whereupon* conveys the idea, that upon the verdict, upon the facts in issue being found for the plaintiff, the court gave judgment for him—which suffices, as the idea is thereby conveyed that the case turned on a question of fact, which the jury have found for the plaintiff.

The constitution of this state requires that "the judges of all courts within the state shall, as often as it may be possible so to do, *in every definitive judgment*, refer to the particular law, in virtue of which such a judgment may have been rendered, and *in all cases* adduce the reasons on which their judgment is founded." *Art.* 4, § 12.

In the present case, we have the judgment of the court *in hæc verba*, "judgment for the plain-

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tiff for the sum of seven hundred and fifty dollars, with costs of suit to be taxed," the [illegible] whereupon, presented to us as shewing the reason on which the judgment was rendered, make no part of it. It is, when used by the clerk, an adverb of *time*, almost synonimous with afterwards. It is not the province of the clerk to detail the reasons which influence the court in what they are doing—he is only to record chronologically what is done.

We readily admit that, if the reasons of a judge could, in any case, be dispensed with, it is when it is bottomed on a verdict—but if they could be dispensed with in such a case, could they be insisted on, on a *demurrer*, or *a demurrer to the evidence*, on an arrest of judgment? In all these cases, as well as in the present one, the record shews, that the facts were previously settled, and that the judge did not do any thing but to apply the law.

When the constitution makes no distinction, and requires reasons to be adduced *in all cases*, can the judges of this court say that none are required in cases in which there is a general or a special verdict, a demurrer to the petition, answer, or to the evidence, or when the judgment is arrested? *Ubi lex non distinguit, nec nos distinguere debemus.*

When a magistrate is about to pronounce upon the claim, to dispose of the property, of a fellow-citizen, he ought to pause a while—and the constitution has wisely lengthened this pause, by requiring the judge to dwell upon and specify on the record the reasons which decide him. If we were to determine that in the present case, no reason was necessary—it would not be easy for us to draw a line between the cases in which a court may abstain from, and those in which it is bound to, assign reasons.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed—and, as there is no statement of facts, or any thing which may enable us to examine the case, it is ordered and adjudged, that it be remanded, with directions to the court to give judgment therein as the constitution requires, referring, if possible, to the particular law, in virtue of which the judgment is rendered, and adducing the reasons on which it is founded—and it is ordered, that the appellee pay costs in this court. *Laverty & al.* vs. *Gray & al.* 4 *Martin*, 463, *Sierra* vs. *Slort*, *id.* 316, *Slocum* vs. *Sibley*, *ante* 682, *Montserrat* vs. *Godet*, *id.* 522, *Doubrere* vs. *Papin*, *id.*

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498, *Poston* vs. *Adams*, *id.* 201, *Urquhart* vs. *Taylor*, *id.* 202.

Wilson for the plaintiff, *I. Baldwin* for the defendant.